IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1830

PAUL FRANCIS IAMPIERI,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS
OF THE STATE OF MARYLAND

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PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioner, Paul Francis Iampieri, prays that a Writ of Certiorari issue to review the order of the Court of Appeals of Maryland entered in the above-entitled case on March 7, 1979, which dismissed the Writ of Certiorari to the Court of Special Appeals of Maryland thereby allowing the Petitioner's conviction to stand.

OPINIONS BELOW

No opinion was filed by the Court of Appeals of Maryland in this case. The order of the Court of Appeals dismissing the Petitioner's Petition for Writ of Certiorari appears in Appendix B (A. 10). The opinion of the Court of Special Appeals affirming the Petitioner's conviction appears in Appendix A (A. 1).

JURISDICTION

The Court of Special Appeals of Maryland affirmed the Petitioner's conviction in an opinion filed on December 11, 1978 (Appendix A, A. 1). The Court of Appeals of Maryland dismissed the Writ of Certiorari in an Order filed on March 7, 1979 (Appendix B, A. 10). The jurisdiction of this court is invoked under 28 U.S.C., Section 1257 (3).

The Federal question involving the use of a general warrant in violation of the Fourth Amendment to the Constitution of the United States was raised by Appellant prior to trial (T. 53) and was addressed by both parties for the Court of Appeals of Maryland. The federal question involving the Appellant's right to impeach his own witness pursuant to the Fifth Amendment to the Constitution of the United States was raised during trial and was fully briefed and argued by both parties before both the Court of Special Appeals of Maryland and the Court of Appeals of Maryland.

QUESTIONS PRESENTED

1. Were the Appellant's constitutional rights under the Fourth Amendment to the Constitution of the United States violated when evidence was admitted, over a timely Motion

to Suppress, which was procured through a general search warrant which did not particularly describe the area to be searched?

2. Was the Appellant's constitutional right to due process under the Fifth Amendment to the Constitution of the United States denied when he was not allowed to introduce proof of a witness' prior inconsistent statement after it had been established that the Appellant had been surprised by that witness' testimony; and, further, whether the Appellant's actions at trial constituted a waiver of that right?

TEXT OF CONSTITUTIONAL AMENDMENTS INVOLVED

CONSTITUTION OF THE UNITED STATES

Amendment Four

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, should not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Amendment Five

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner was convicted of a sexual offense in the First Degree, and lesser included offenses, along with assault with intent to maim after a trial by jury on January 4, 5, 6, 9 and 10, 1978. Petitioner was subsequently sentenced to a term of ten years to the Maryland Department of Correction on March 31, 1978.

The State's case was based almost entirely on the testimony of two witnesses; the alleged victim, Dorothy Schuldt, and the Co-Defendant, Harold Wheeler. Ms. Schuldt testified that she had had two beers and two shots of whiskey at home before she went looking for her daughter, who had allegedly not returned home as expected that night. At approximately 10:30 p.m., she took a cab to a nearby tavern, but failing to find her daughter there, continued her search by stopping in at two other neighborhood bars; but again, her efforts proved to be fruitless. Ms. Schuldt testified that during her stops at these inns, she had two beers and left the last one around closing time (2 a.m.), apparently in order to return home. At this time, Mrs. Schuldt stated that a car came up behind her and the occupants offered to help her look for her daughter. Quickly thereafter, two men got out of this car, took her by the arms, and forced her to sit between them. She identified the Petitioner as being one of them.

Mrs. Schuldt then testified that the two men forced her to a house and pushed her into a bedroom where she was ordered to take off her clothes. The shorter of the two men, later

identified to be the Co-Defendant, Harold Wheeler, proceeded to force Mrs. Schuldt to engage in sexual intercourse with him. Upon completion, Wheeler left, whereupon the Petitioner entered the room and compelled her to engage in perverted sexual practices with him. She further testified that the Petitioner burned parts of her body with a cigarette and thereafter released her.

Harold Wheeler, Co-Defendant, testified that he and the Petitioner did, in fact, pick Ms. Schuldt up that night; but that Ms. Schuldt had walked up to the car, asked them what they were doing, and then voluntarily got into the car next to him. He further stated that, after arriving at Petitioner's apartment, he observed the Petitioner enter the bedroom and, a short time later, leave that bedroom. He continued, stating that he then entered the bedroom and saw Ms. Schuldt nude on the bed. Wheeler stated he did not touch the alleged victim, but instead, left the room, borrowed the Petitioner's car and returned home.

ARGUMENT

I.

THE SEARCH WARRANT PROCURED WAS A GENERAL WARRANT AND THEREFORE SHOULD HAVE BEEN DECLARED INADMISSIBLE AT TRIAL.

The next morning, officers of the Baltimore County Police Department secured a search warrant which described the place to be searched as 2001 Oak Avenue. This address houses a multiple-family dwelling containing three separate apartments and this fact was known, or should have been known, by the

detectives involved both at the time they procured the warrant and at the time the warrant was executed. This is evidenced by the fact that prior to acquiring the aforementioned warrant, the alleged victim was interviewed, and this should have made the interviewing officers aware that 2001 Oak Avenue was a multiple-family dwelling. Further, this building has three separate and distinct entrances along with other clear external indicia that more than one family occupied the building. Despite these factors, the officers failed to use any reasonable means to determine whether more than one family occupied the building and, in fact, entered more than one apartment during the search which ended in the discovery of the evidence which was later admitted at trial against the Petitioner.

It is well established that the sufficiency of the particularity of a warrant's description depends on the facts and circumstances of each case; but ordinarily, a warrant authorizing the search of an entire building occupied by different families is null and void. *United States v. Esters*, 336 F. Supp. 214 (E.D. of Mich. 1972); *Tynan v. United States*, 297 F. 177 (CA 9th Cir. 1924) cert. den. 266 U.S. 604; *U.S. v. Hinton*, 219 F.2d 324 (CA 7th Cir. 1955). The test set forth is not whether the officers involved acted in good faith, but rather "whether they should have known that the building was not a one-family home." 336 F. Supp. at 219. The Court in *Esters* determined, as was also obvious in the case at bar, that a "person who made a reasonable observation of the premises should have known that [it] was a [multi-family] dwelling no later than the time at which he actually entered the building." 336 F. Supp. at 216.

The fact that the officers in this instance closed their eyes to the obvious does not cure the fatally defective general warrant.

II.

THE PETITIONER WAS DENIED HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL WHEN HE WAS NOT ALLOWED TO INTRODUCE EVIDENCE OF HIS OWN WITNESS' PRIOR INCONSISTENT STATEMENT.

At trial, the Petitioner called a witness, Mrs. Dora Self, in order to question her concerning a statement she had made to a private investigator hired by the Petitioner. When Mrs. Self denied making this statement, the Petitioner claimed surprise; and, out of the presence of the jury, proffered to the court that Mrs. Self made the following statement to the private investigator:

> "Mrs. Self stated that Mrs. Schuldt told her that she did what she did that night because she was angry with her boyfriend because he was in some kind of trouble with the Pagan motorcycle gang and quoted Mrs. Schuldt as saying the two (2) who raped her drove an old beat-up blue car with a stripe around it and threatened to come back and kill her." (T. 392).

The Petitioner's counsel further stated that he felt he was "entitled to explain to the jury the reason this witness was called and what [was] anticipated," and asked to be allowed to call the private investigator to state what Mrs. Self said to him. The court disagreed with this proposition and directed the Petitioner's counsel to excuse Mrs. Self and explain to the jury that she was being dismissed because she was not going to say what had been anticipated and that the anticipated testimony was hearsay. The Petitioner's counsel followed these directions and excused the witness.

. Initially, the Court of Special Appeals of Maryland determined that the actions of the Petitioner's counsel in following the court's stated directions constituted a waiver of the Petitioner's right to question the trial court's erroneous ruling on Appeal. This is a heavy price to exact where the case involved carries a criminal sanction thereby putting the Petitioner's very liberty at stake. The Petitioner is guaranteed, under the Fifth Amendment, a fair and impartial trial; and to make a technical search for a waiver in such an instance is violative of this guarantee. A waiver is ordinarily an "intentional relinquishment or abandonment of a known right or privilege" *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

The fact that the Petitioner's counsel did not explicitly state that he objected to the Court's ruling is not determinative. An illuminating analogy is presented in the Federal Rules of Criminal Procedure, rule 51, which is directly related to the Maryland rule on waiver, rule 522. The Federal Rules require that the trial Judge be informed "of possible errors, that he may have any opportunity to consider his ruling and if necessary, correct them, and where it appears on the record that the point urged on appeal was called to the attention of the trial court in such manner as to clearly advise it as to the question of law involved, that is sufficient." *United States v. General Motors Corporation*, 226 F.2d 745, 750 (3d Cir. 1955).

It is clear that the trial court in this instance was well aware that the Petitioner's counsel felt he was entitled to prove Mrs. Self's prior statement to the jury by calling the private investigator or by proffering the statement in their presence. To find a waiver in this instance would deny the Petitioner's right to a fair trial and would constitute a classic case of the triumph of technicality over justice.

Further, the proof of Mrs. Self's prior inconsistent statement was highly relevant and necessary in order to provide the Petitioner with a fair trial. The Petitioner had a right to offer this prior statement to the jury so that he could afford an opportunity to show why he called the witness. The denial of such a right by the trial court was a total abuse of discretion and cannot be tolerated in light of the present day concepts of due process of law. The Petitioner was, therefore, clearly prejudiced by such a ruling and must be granted a new trial.

SUMMARY

Evidence was admitted at the Petitioner's trial which was procured by means of a general search warrant which did not particularly describe the place to be searched. This evidence was, therefore, procured in violation of the Fourth Amendment of the Constitution of the United States and should be suppressed.

Additionally, the Petitioner was denied due process of law when he was not able to prove a witness' prior inconsistent statement. This prior inconsistency was crucial in order to enable the jury to reach a fair conclusion concerning the Petitioner's guilt or innocence; and, therefore, its preclusion was in violation of the Fifth Amendment to the Constitution of the United States and requires that the Petitioner be granted a new trial.

CONCLUSION

The writ should be granted as the search warrant procured in the instant case was a general warrant, thereby necessitating the suppression of all evidence derived therefrom. Additionally,

it should be granted because the Petitioner was denied his right to a fair and impartial trial by the lower court's preclusion of the aforementioned witness' prior inconsistent statement, thereby necessitating a new trial.

Respectfully submitted,

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APPENDIX A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND
No. 335
September Term, 1978

PAUL FRANCIS IAMPIERI

v.

STATE OF MARYLAND

Gilbert, C.J.,
Morton,
Thompson,
JJ.

PER CURIAM

Filed: December 11, 1978

Paul Francis Iampieri, appellant, was convicted by a jury in the Circuit Court for Baltimore County (Maguire, J.) of a sexual offense in the first degree, Md. Ann. Code art. 27, § 464(a)(1); a sexual offense in the second degree, § 464A (a)(1); a sexual offense in the third degree, § 464B (a)(1); a sexual offense in the fourth degree, § 464C(a)(1); perverted practice, Md. Ann. Code art. 27, § 554; and assault. As a result of the convictions appellant was sentenced to a total of ten (10) years imprisonment in the aggregate.

In this Court the appellant raises two issues for our review, asserting that the evidence was insufficient to sustain the charges against him, and that the trial judge erroneously restricted appellant's right to demonstrate his surprise at a defense witness's testimony, as compared to a prior inconsistent verbal statement.

Appellant asserts that the prosecutrix "gave an incredible explanation as to why she was wandering on unlit streets in Baltimore County at two o'clock in the morning." He also avers that a co-defendant, who testified on behalf of the State said that the "victim had acted entirely voluntarily while" with the co-defendant. What appellant overlooks is that the testimony of the victim, if believed, was standing alone, sufficient to sustain the conviction. *Estep v. State*, 14 Md. App. 53 (1972); *Crenshaw v. State*, 13 Md. App. 361 (1971); *Williams v. State*, 11 Md. App. 350 (1971). Moreover, the weight of the evidence and the credibility of the witnesses is a matter for the jury to assess, not this Court. *Berlin v. State*, 12 Md. App. 48 (1971); *Bieber v. State*, 8 Md. App. 522 (1970); *Wilkins v. State*, 5 Md. App. 8 (1968). Furthermore, the jury was not required to believe the appellant nor his witnesses. *James v. State*, 14 Md. App. 689 (1972); *Pinkney v. State*, 12 Md. App. 598 (1971); *Tillery v. State*, 3 Md. App. 142 (1968).

Appellant's challenge to the sufficiency of the evidence is devoid of merit.

Appellant next contends that the trial court erred by refusing to permit him to show the jury how he had been surprised by the changed testimony of a witness who had allegedly previously made a statement favorable to appellant and to explain why he had called her as a witness.

At trial the appellant called Mrs. Self, a neighbor of the victim, to elicit a statement she had made to a private investigator. Mrs. Self supposedly told the private investigator that she had spoken with the victim after the crime, and that they had discussed the incident. The transcript reveals the following with respect to Mrs. Self's testimony:

BY MR. GLADSTONE (Defense Counsel).

"Q. In August of this year. . .[the prosecutrix] was alleged to be a victim of a certain offense, did she have occasion to talk with you after that?

A. No, sir.

Q. Did you have an occasion to talk to a private investigator in this Case?

"A. Yes, sir.

Q. How long did you talk with him?

A. Just before I came here.

Q. Did you also talk to him on Monday, December the 19th, this past December?

A. No, sir.

Q. You did not talk to an investigator?

A. If I did, I don't remember.

. . . .

THE COURT: Mrs. Self - - now, Mrs. Self, I am asking you this question. Did you talk to. . . [the prosecutrix] after an alleged incident, or did you?

THE WITNESS: No, I did not.

THE COURT: You did not?

THE WITNESS: No, I did not.

Q. (BY MR. GLADSTONE) Mrs. Self, when you say you did not talk to her after this incident - -

A. I had seen her, on her air conditioner she was speaking something about. She said I hate to go to trial because I have to go to a jury trial. She didn't want to tell me nothing and I didn't want to find out nothing, really.

Q. Have you talked to her since August?

A. No.

Q. Not at all?

A. No, not at all.

"MR. GLADSTONE: At this time I would like to claim surprise."

Thereafter the court allowed the defense to treat Mrs. Self as an adverse or hostile witness and to examine her as if on cross examination, but precluding the answers from being considered as substantive evidence. Mrs. Self recalled her conversation with the private investigator. The defense resumed the direct examination of Mrs. Self, and after frequent objections, a bench conference, outside the presence of the jury, resolved objections of relevance to a line of questioning regarding the drinking habits of the prosecutrix. Oral examination continued:

"THE COURT: Mrs. Self, in your statement to the investigator, at least from his report, you stated that. . .[the prosecutrix] told you that she did what she did that night because she was angry with her boy friend because he was in some kind of trouble with the Pagan motorcycle gang. Did you tell him that?

THE WITNESS: No, he misunderstood me.

THE COURT: Did you tell him that?

THE WITNESS: No, I did not. I did not tell that to the investigator.

THE COURT: Also quoted. . .[the prosecutrix] as saying the two who raped her drove an old beat

up blue car with a stripe around it and has been back to her residence and have threatened to kill her. Did she tell you that?

THE WITNESS: No, he misunderstood that. He misunderstood a lot of things. The only thing I know coming from the drug store, a policeman said her boy friend was involved in a motorcycle gang. She did not tell me this.

MR. GLADSTONE: At this point, if she is denying these statements, I think I have a right to explain to the jury why she was called, to ask her these statements - - did you say them and state, because we claim surprise, none of this evidence is substantive evidence, but merely to show why the witness was called."

The State maintains that the appellant failed to object to the ruling of the trial judge which denied them the right to bring in the private investigator to testify what Mrs. Self had denied during her testimony and which ruling limited appellant's explanation to the jury. The State argues that this failure to raise the issue at trial constitutes a waiver, and that the issue may not be considered for the first time on appeal. Md. Rule 1085.

We do not think the record supports the State's argument. After Mrs. Self denied making the statement attributed to her by the private investigator, appellant made a request to bring the investigator into the court.

"MR. GLADSTONE: It is my understanding I am entitled to explain to the jury the reason this witness was called and what I anticipated.

THE COURT: Not as to what, but the fact that you called her based on the fact that she had certain things to testify to, but she is not going to tell it the way you thought it would be, and you are going to dismiss her.

MR. IRWIN: It is already before the jury then from yesterday why he wanted to call her.

THE COURT: She emphatically denies that she made the statement to the investigator.

MR. GLADSTONE: Can I bring in the investigator to state what she said to him?

MR. IRWIN: It is totally collateral.

MR. GLADSTONE: I think I am entitled to bring that in.

MR. IRWIN: Your Honor, that is silly. If it is not substantive evidence, it is silly.

THE COURT: I don't think you can do that."

The court responded in the negative and defense counsel seemingly agreed. He then sought out the court's advice on how to deal with the further examination and dismissal of Mrs. Self.

"MR. GLADSTONE: What is Your Honor's direction? Should I excuse her?

THE COURT: I think you can say to the jury you have dismissed her because she is not going to say what you thought she was going to say from the witness stand. Many of the things she has said so far are purely hearsay. Things she now says that she never told the investigator.

MR. GLADSTONE: I would like to place one thing on the record. That is the report I have from Public Security Investigation, Inc., which quotes Mrs. Self as follows - - 'Mrs. Self stated that Mrs. Schuldt told her that she did what she did that night because she was angry with her boy friend because he was in some kind of trouble with the Pagan motorcycle gang and quoted Mrs. Schuldt as saying the two who raped her drove an old beat up blue car with a stripe around it and threatened to come back and kill her.' Those are the things I had intended to ask before the jury. If she denied it, call the investigator and ask if this is what she said. However, I will abide by the Court's ruling.

Q. (BY THE COURT) [to Mrs. Self] You are saying to the Court you never said that?

A. I never said anything about the Pagans.

Q. How about the blue car?

A. The blue car came to my house and tried to sell me insurance, had a blue car with a stripe around it. I told them I had just had a heart attack and they have not been back for three weeks.

MR. GLADSTONE: *I misunderstood you out in the hall.*

THE WITNESS: *The investigator admitted that he misunderstood me.*

MR. GLADSTONE: *Thank you. If you will wait outside, we will arrange to have you transported back home.*

THE COURT: Bring in the jury.

MR. GLADSTONE: Your Honor, as per your directions, I have asked Mrs. Self to be excused because in fact there was as indication she was not testifying of her own personal knowledge as to the matters. I anticipated that she was going to testify as to her own personal knowledge. With that, I will call Michelle Gosnell." (Emphasis supplied.)

We think it clear that counsel for appellant did misunderstand Mrs. Self, and that he clearly acquiesced in the court's action. Counsel was allowed to explain to the jury that he excused Mrs. Self because she did not possess the personal knowledge that counsel thought she possessed.

The agreement with Judge Maguire's ruling in the matter constitutes a waiver.

JUDGMENTS AFFIRMED.
COSTS TO BE PAID BY
APPELLANT.

APPENDIX B

IN THE COURT OF APPEALS OF MARYLAND
September Term, 1978
Petition Docket No. 452
(No. 335, September Term, 1978 Court of Special Appeals)

PAUL FRANCIS IAMPIERI

v.

STATE OF MARYLAND

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: March 7, 1979.